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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 262

WILLIAM J. B. MYRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 1444-1461) is reported in 174 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1949 (R. 1461-1462) and petition for rehearing (R. 1463-1523) was denied on June 13, 1949 (R. 1525). The time for filing a petition for a writ of certiorari was extended to and including August 12, 1949, by order of Mr. Justice Rut-

ledge, filed on July 6, 1949 (R. 1531). The petition for a writ of certiorari was filed on August 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court properly instructed the jury:

   A. With respect to petitioner's obligation to keep adequate records of income and to make such records available for inspection by internal revenue agents;

   B. With respect to the deduction of an item of expense in 1944 and in 1945;

   C. With respect to the effect of the partnership agreement on the allocation of business expenses.

3. Whether the prosecuting attorney was guilty of prejudicial misconduct.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra,* pp. 25-29.

STATEMENT

After a trial by jury in the United States District Court for the Western District of Missouri (R. 37-1429), the petitioner was convicted (R. 12-13) on all four counts of an indictment (R. 1-3) charg-

ing wilful attempted evasion of his income taxes for the calendar years 1941, 1942, 1943 and 1944, in violation of Section 145(b), Internal Revenue Code. He was sentenced to imprisonment for one year and one day on each count, to run concurrently, and to pay a fine of $500 each on counts one and three and $1,500 each on counts two and four, a total imprisonment of one year and one day and a total fine of $4,000, with costs (R. 29-31). On appeal to the Court of Appeals for the Eighth Circuit, the judgment of conviction was affirmed (R. 1461-1462).

The pertinent evidence may be summarized as follows: At the outset of the investigation of his income tax returns, petitioner, a partner in the law firm of Sizer and Myres which specialized in personal injury and wrongful death claims principally against railroads in Arkansas, Kansas, Missouri and Oklahoma (R. 908),[1] told Revenue Agent Starr he had no books or records, no cancelled checks or check stubs and no case files from which his income for years prior to 1945 could be computed (R. 236,

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[1] Petitioner was admitted to the Missouri State Bar in 1927 (R. 905, 955) while a senior at Missouri University Law School (R. 906, 907); he practiced for a time in Oklahoma, where, in 1934, he was suspended from the practice of law for one year following disbarment or disciplinary proceedings for embezzlement of a client's funds (Pet. App. pp. 58-61); in 1934, he moved to Monett, Missouri, and there became associated with F. P. Sizer, first as an investigator (R. 921), then as a partner with increasing interest in the business until March 1, 1941, when he was taken in as a full 50-50 partner as to all cases received after that date (R. 551, 921); as to pending cases petitioner was to retain his previously existing 40% interest (R. 551, 939, 941).

237, 531, 544). He explained that following unsuccessful disbarment proceedings against him and Sizer several years before,[2] Sizer (the senior partner) had refused to keep any records and had refused to let petitioner keep any, fearing similar future investigations (R. 544, 929). With petitioner's permission, Starr, assisted by Special Agent Wyble, then proceeded to examine and analyze records of the Sizer and Myres firm account and Myres' two personal accounts at the Gillioz Bank of Monett through which petitioner indicated all his law business cleared (R. 544, 545, 548-549). From deposit tickets and the bank's ledger sheets and from the recordak films of all checks handled by the bank between November, 1940, and January, 1945,[3] the agents prepared transcripts of the three accounts for 1941, 1942, 1943 and 1944 (Govt. Ex. 208-212; R. 546-549, 552-623). The information contained in these transcripts, supported by the testimony of about 125 persons, including about eighty for whom petitioner's firm had obtained favorable settlements of claims or lawsuits, as well as bank officers, attorneys who had shared in fees earned and others, was the principal basis for the actual net income figures relied upon by the Government.

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[2] This reference was to 1936 disbarment proceedings in Missouri, not the 1934 proceedings in Oklahoma mentioned in footnote 1, *supra*.

[3] The 175 cases of films which the agents were required to examine to ascertain what checks passed through the three accounts were introduced in evidence (R. 177-180, 546-547).

Petitioner testified and denied telling the agents he had destroyed his cancelled checks, check stubs or case files (R. 910); he stated that he kept every check he ever wrote (R. 918) and produced and identified almost 3,000 cancelled checks for the three bank accounts in question for the years 1937 through 1945 (R. 957-1118), as well as three filing cabinets of case files (R. 952). Milo Lang, public accountant, and A. Henry Cuneo, certified public accountant, called as income tax experts for the defense, testified that from these cancelled checks and case files and from information furnished by petitioner, they computed petitioner's actual income for the years involved (R. 1235-1236, 1269, 1279, 1292, 1316, 1335, 1358). The net income reported by petitioner (R. 80-169) and his actual net income as computed by the revenue agents (R. 827, 830, 833, 836) and by the defense experts compares as follows (R. 1328, 1338, 1344, 1352):

Year	As Reported in Returns	As Computed	
		By Revenue Agents	By Defense Experts
1941	$4,142.75	$22,490.76	$6,767.10
1942	1,634.30	13,690.87	2,009.27
1943	2,415.70	9,636.25	2,512.77
1944	3,558.32	25,126.74	5,879.35

The agents, in their calculations, allowed petitioner 50% of all expenses and advances to clients whether paid from the firm's account or from Myres' personal accounts, as evidenced by the checks appearing in the recordak which went back to December 1, 1940. Lang and Cuneo, however, allowed petitioner 100% of the expenses

and advances to clients paid from petitioner's personal accounts (R. 1295, 1325), and this was the principal reason for the difference in net results obtained, as conceded by petitioner here (Pet. 8) by his expert, Cuneo, at the trial (R. 1325) and recognized by the trial court (R. 1419) and by the Court of Appeals (R. 1449).

ARGUMENT

1. Petitioner does not directly attack the sufficiency of the evidence, as he did in his motion for a new trial (R. 13) and on appeal (R. 1445), but suggests as a "background" (Pet. 15) to his discussion of specific alleged errors, that the evidence was "evenly balanced and of doubtful adequacy" (Pet. 10-11). In this connection he complains of the Government's omission of expenses incurred in earlier years and deductible in the tax years in question (Pet. 11-12). In allowing expenses incurred in the years prior to the settlement of the case,[3a] the agents were limited to those found in the recordak films which went back only to December 1, 1940. These films, of course, did not reflect the many expense items from 1936 to 1940 appearing in petitioner's schedules, but petitioner's failure to substantiate many of those items considerably weakened his claim that they were all bona fide expenses. (R. 992-993, 1009-1011, 1038-1039, 1045-

[3a] Petitioner used, with approval, the completed contract method of reporting, not claiming expenses incurred in handling a case until the year in which settlement was effected and a fee collected (R. 1236, 1324).

1046, 1070, 1090, 1108, 1279.) Petitioner next relies on the Government's failure to show that petitioner was reimbursed by Sizer for one-half of those expenses paid by petitioner from his personal account (Pet. 12-13). In this connection, it is noteworthy that petitioner nowhere has challenged the trial court's statement, in his charge to the jury, that (R. 1421)—

> I do not recall any evidence, perhaps you do, where Mr. Sizer was issued a check by Mr. Myres for a sum equal to 25 percent of the total amount of a case that was settled where the evidence establishes that expenses were incurred in such case. There is, I recall, much evidence to the contrary.

This meant that Myres usually got reimbursement from Sizer by deducting Sizer's share of the expenses from the latter's portion of the fee. Petitioner also complains that the Government excluded consideration of any expenses paid by Sizer of which petitioner would have been entitled to deduct a 50% share (Pet. 13-15). The Government's failure to allow for any expenses paid by Sizer was of little importance. The positive evidence of Sizer's unreimbursed expenses relied upon by petitioner, the "14 Crabtree case checks drawn by Sizer in 1940 and 1941" (Pet. 14, fn. 6) amounted to only $121.50 (R. 841-846). Moreover, Sizer suffered a heart attack about September 1, 1943, and had recurrent attacks thereafter as a result of which he was unable to pursue his practice

until some time after August 9, 1944; and in 1943, before his first attack, he had spent from ten days to two weeks every month at his table factory in Kingston, Tennessee (R. 457-458, 1162-1163). Petitioner admitted that he made most of the trips for which money was spent for travel expenses and advances and that he handled most of the firm's money himself (R. 1138-1139, 1208). Travel expenses and advances to clients by Sizer could not, therefore, have been of any great consequence.

Petitioner's own experts, who gave him the full benefit of every expense he claimed, whether or not substantiated, admitted he did not fully report his net income in any of the four years involved. The admitted understatement for 1943 was only three per cent, but for 1942, it was nineteen per cent and for 1941 and 1944 it was forty per cent each year. These admissions, together with the fact that the jury was not required to accord any weight to the unsubstantiated expenses claimed by petitioner,[4] make it plain that there was ample evidence to justify the verdict.

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[4] The possibility that petitioner's travel expenses were padded was illustrated when, on cross examination, his attention was called to the fact that he showed his assistant Sweeney as having made two trips to Westport and one trip to Springfield (168 miles) on one case and two trips to Cassville (80 miles) on another case, all on the same day, February 4, 1941 (R. 1205); and that he showed Sweeney as having traveled to Carthage (80 miles) on one case, to Cassville (40 miles) on another case, two more trips to Cassville on other cases, and a trip to Joplin, all on November 11, 1940. Petitioner's only explanation was "Well, I didn't compile this record." (R. 1206.) It appears also that some checks were charged as expenses by Lang merely on the word of petitioner who pre-

2. (a) Petitioner attacks as improper the court's instructions dealing with the related obligations of a taxpayer to maintain records reflecting income (Pet. 31-35) and to make such records available for inspection by internal revenue officers (Pet. 15-26). As to petitioner's obligation to keep books and accounts or records, the court indicated that no particular method or system was mandatory and that taxpayer could adopt any he deemed suitable to his purpose so long as the amount of his net income could be determined therefrom. The court referred to the case files which petitioner testified were maintained and stated that if the jury believed this system was sufficient for reasonably and fairly determining the firm's income and that of its partners it was sufficient under the law, but that if they believed from the evidence that the firm and its members kept no books of account or records from which net income could be reasonably determined then that was a matter to be considered along with other facts and circumstances shown in evidence as bearing on the question of wilfulness. (R. 1423-1424.) The instruction requested by petitioner (R. 1432) assumed facts not justified by the evidence, namely, that Sizer had a system of keeping track of income which petitioner continued and followed and that

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tended to recall items going back to 1936 (R. 1275-1276, 1279, 1288, 1289). This should be compared with petitioner's inability to recall whether a $6,090 fee had been included in his return, which prompted his own counsel to chide him "not to kid the boys [agents] as any country lawyer would know whether or not he reported $6,000." (R. 534.)

one theory of the defense was petitioner's honest belief he was keeping adequate records. The evidence was to the contrary. According to petitioner there was no "ledger or journal or other financial record" of the transactions of the firm or of himself or Sizer; he found none when he went into the office in 1936 and "There was none ever kept" (R. 950); and he couldn't make a correct return because Sizer wouldn't let him keep records so that he could make a correct return (R. 1208). "There was no records kept of the cases and no records kept of the money loaned or gross income during any of the years. That was started after I took the business over the 1st of January of this year" (1945).[5] (R. 922.) It is clear, therefore, that as the appellate court pointed out (R. 1455), petitioner "was not entitled to a more favorable instruction" than the one given.

As to the portion of the charge dealing with a taxpayer's obligation to make his records available for inspection, petitioner concedes that the jury was entitled to draw an adverse inference from his refusal, when requested to do so by the agents, to make his cancelled checks and case files available to them, but argues that the evidential weight of this

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[5] When asked by the agents why his income was not all reported, petitioner replied: "there is no way in the world for me to know. There wasn't any way for me to know, the way I was forced to keep the books down there, to know how I did stand." (R. 936.) He also stated: "I don't think God Almighty, himself, could tell you from month to month how we stood other than between ourselves, or at the end of the year either." (R. 928-929.)

inference was "gravely increased" by the erroneous statement that the law required him to comply with the agents' requests.[6] (Pet. 17-18). He reasons (Pet. 18-23) that notwithstanding the statutory authority of the internal revenue officers to inspect any relevant books or papers (Section 3614(a), Internal Revenue Code, Appendix, *infra*, p. 26), and notwithstanding the statutory requirement that a taxpayer keep records and comply with the regulations (Section 54(a), Internal Revenue Code),[6a] which, in turn, require that such records be kept available for such inspection (Treasury Regulations 111, Section 29.54-1), the jury was given the wrong impression because petitioner was under no legal duty to make his records available for inspection until a subpoena had been obtained by appropriate process as provided for

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[6] The court said (R. 1424-1425):

"If a taxpayer does keep books of account or records from which his net income may be ascertained, then regardless of the form in which they are kept, the law requires him to produce the same and make them available at all reasonable times for inspection by internal revenue officers of the Government, so long as the contents thereof may be material in the administration of any internal revenue law enacted by Congress. The failure or refusal of a taxpayer having such books and records in his possession or under his control, revealing his net income, to produce the same for inspection by internal revenue officers of the Government, when requested so to do, is likewise a circumstance which the jury may consider in determining the wilfulness with which a taxpayer acts."

[6a] Sec. 54. Records and special returns—(a) By taxpayer. Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

in Sections 3615(e) and 3633(a), Internal Revenue Code (Appendix, *infra*, pp. 26-27).

This contention ignores the fact that petitioner risked prosecution for a misdemeanor [7] by his refusal to make available to the agents the cancelled checks and case files which he had in his possession.[8] As a practical matter, moreover, it requires a considerable straining of the imagination to assume that the adverse inference undoubtedly drawn by the jury from the evidence of petitioner's obstructive tactics was based to any critical degree on the fact petitioner had breached a legal duty. He did more than merely fail or refuse to make his records available. In every conference during the investigation he indicated that there was not in existence any such records as those he later produced at his trial, although he several times affirmed his desire to cooperate in every way with the investigating

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[7] Section 145(a), Internal Revenue Code (Appendix A, *infra*, p. 25).

[8] "The purpose of requiring the taxpayer to supply the information was to enable the Commissioner to compute the tax and ascertain its correctness, and the taxpayer, under the provisions of section 146(a) * * * could not refuse to supply the information to carry out this purpose without being guilty of a misdemeanor for which he might be indicted, convicted, fined, and imprisoned. If he had refused and claimed immunity under the Fifth Amendment, the government could have pursued one of two courses: (1) It could have presented his refusal to a grand jury and had him indicted, or (2) it could have resorted to the District Court * * * to compel his testimony and the production of his books. At either time, the trial of the indictment or the hearing before the District Court to compel testimony, the question of his constitutional guarantee would have been available as a defense." *Nicola* v. *United States*, 72 F. 2d 780, 784 (C. A. 3d).

officers. Thus the argument that without the court's statement as to his legal obligation the jury might have inferred good faith on petitioner's part is flatly contradicted by the record.

(b) Petitioner also claims (Pet. 26-31) that prejudicial error was committed by the trial court when it rejected his requested instruction No. 16 (R. 1438) relating to petitioner's good faith in deducting $8,000 in 1944 as the cost of purchasing Sizer's interest in the firm's pending cases following Sizer's death. Sizer died on December 30, 1944 (R. 909). In January, 1945, petitioner paid $8,000 to the administrator of Sizer's estate for his deceased partner's interest in the cases then pending in the office (R. 1136-1138). When Lang made up petitioner's return for 1945 he included the entire $8,000 as an expense item (R. 1234). After Lang had accompanied petitioner and his attorneys to a conference in Washington in April, 1946 (R. 1302, 1312), Lang was told by petitioner that the latter had included the $8,000 as an expense item in his 1944 return thinking it was proper because he had closed the deal with Sizer in December, 1944, just prior to the latter's death (R. 1136-1137). No such item appeared in the 1944 return or accompanying schedules (Govt. Ex. 137, R. 159-169) which Lang had prepared entirely from information furnished him by petitioner (R. 1280). It seems obvious, therefore, that if petitioner actually deducted the $8,000 in 1944, he was guilty of bad faith in conceal-

ing that fact from Lang until after the deduction had been claimed again for 1945; and if he did not deduct it in 1944, his claim that he had done so was an ill-conceived attempt during the investigation to create an apparently bona fide explanation for $8,000 of the 1944 understatement of income.[9] If the jury believed his claim that the $8,000 was deducted in 1944, it was entitled to consider his concealment of that fact from Lang early in 1945, in assessing petitioner's good faith, but the requested instruction failed to take that fact into consideration and was not, therefore, responsive to the evidence. The trial court's discussion of this transaction was, if anything, favorable to the petitioner since it neglected to mention Lang's testimony as to when he first learned of the 1944 deduction. Contrary to petitioner's argument here (Pet. 28), he was still claiming the item in both years for, as the trial court pointed out, in the accounts reconstructed by petitioner's own expert witnesses it was still carried as a deduction in each year [10] (R. 1422). We submit that no prejudice resulted from the court's refusal to give petitioner's requested instruction No. 16.

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[9] It is difficult, therefore, for us to perceive on what evidentiary basis the jury could have inferred good faith on petitioner's part in this matter. His testimony that he recognized the item was deductible in only one of the two years and that the 1945 deduction was taken to insure tax benefit in one year, pursuant to Lang's advice (Pet. 28), was a palpable falsification in the light of Lang's testimony.

[10] On cross examination (R. 1208) petitioner was asked, "In other words, you are charging $16,000 as a deduction, $8,000 in 1944 and the same $8,000 in 1945, is that right?" to which he replied: "That is correct."

(c) Petitioner seeks to predicate reversible error on a paragraph of the court's charge relating to the effect of the partnership agreement on the allocation of the firm's expenses between the partners (Pet. 35-43). The portion of the charge containing the passage which he attacks covers about four printed pages (R. 1418-1422) and is reproduced in Appendix B, *infra*, pp. 29-34. A reading of it will demonstrate its completeness and fairness and the total lack of merit in petitioner's contention. He argues (Pet. 37-39) that the trial court distorted the evidence and made his contentions appear so fantastic as to mislead the jury by representing that he was contending for the right to deduct 100% of all the expenses of the partnership. This argument is apparently based upon the following language (R. 1419-1420):

> He does not state that there was any agreement between him and Mr. Sizer that he, Mr. Myres, was to stand all expenses of the maintenance of their law partnership out of his 50 percent share. From the arrangement and agreement stated by him, the presumption is to the contrary. If Mr. Myres was not obligated under his partnership agreement with Mr. Sizer to bear, out of his 50 percent of the fees received by his law firm, all expense of the maintenance of such firm, then Mr. Myres has no right to deduct 100 percent of the expense which he claims as a deduction in determining the amount of his income for the years involved. He could not, under the law, if he was not legally obligated so to do, voluntarily assume the

> total amount of such expense, and use the total thereof as a deduction from his income in determining the amount of his own individual net income during the years in question.

But petitioner's argument ignores the fact that in paragraphs which preceded this statement the court said (R. 1418-1419):

> In ascertaining the amount of business expense to which he makes claim of deduction in each of the years involved, Mr. Myres's evidence is that he is entitled to deduct from the income received by him from the firm of Sizer & Myres one-half of the expense as revealed by all checks drawn on the bank account of Sizer & Myres, and 100 percent of the items of expense as established by the checks issued for expense on the bank accounts carried in his individual name or as trustee.
>
> It is chiefly in the claim of Mr. Myres to an allowance of 100 percent of the expenses revealed by checks issued on bank accounts carried by him in his name, personally or as trustee, that a decision of the factual issue as to what was his actual net income for the years in question depends. * * *
>
> So the question is presented to you, can Mr. Myres reasonably, under the evidence, claim as a deduction from the income received by him from his law firm 100 percent of the items of expense revealed by checks issued therefor on bank accounts carried in his name?

And in paragraphs which immediately followed the language petitioner complains of the court said (R. 1420-1422):

> Therefore, if you find and believe from the evidence that Mr. Myres did not agree with Mr. Sizer to assume 100 percent of the expense incurred by the law firm of Sizer & Myres, as established by checks drawn on his bank account for that purpose, and, in fact, that he did not assume 100 percent of the payment of such expense, * * *.
>
> In determining whether defendant should be allowed the full amount of business expense items paid out of checking accounts standing in his name, * * *.
>
> * * * Mr. Myres claims that all checks which he issued for case expense on his personal bank accounts were borne by him. * * *
>
> If you find and believe from the evidence beyond a reasonable doubt that the defendant knew that he was not legally liable for the full amount of the expense *which he now claims,* and that defendant did not, in fact, bear the total amount of *such* expense out of his share of the fees received from the law firm, and that defendant, * * * nevertheless undertook to and did claim a deduction of the full amount of *such* expense items * * * then those are facts, if you so find them, from which wilfulness on the part of the defendant may be inferred by you. (Italics supplied.)
>
> If, however, you find from the evidence that under any arrangement or agreement defend-

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> ant had with Mr. Sizer that he was to defray and pay all the expense of the handling of a case or cases out of his share of the fees received from the firm, then under the law the defendant would be entitled to the full amount of such expense items from the income received by him from such law firm.

We believe it is abundantly clear from the above that the trial court correctly stated petitioner's contentions, and the argument to the contrary is without merit.

Petitioner contends that the instruction relating to the deduction of expenses paid from his personal accounts was further prejudicial because of the statement therein that from a 50-50 arrangement partners are presumed, in law, to have agreed to share profits and losses equally (Pet. 35-43). Here again, petitioner resorts to the transparent device of isolating statements from their context in a four-page instruction, without giving consideration to the greater part of the charge of which they were a part. He concedes that "the stated agreement of 50-50 partnership might, with all the other evidence in the case, be considered as evidence by the jury in determining the fact of the right to the 100% deduction" (Pet. 41). From a reading of the whole charge it is apparent that the issue was presented to the jury squarely on that basis. In at least five different paragraphs (as indicated previously, *supra*), the court referred to petitioner's

claim, and in concluding its instruction the court said (R. 1421-1422):

> If, however, you find from the evidence that under any arrangement or agreement defendant had with Mr. Sizer that he was to defray and pay all the expense of the handling of a case or cases out of his share of the fees received from the firm, then under the law the defendant would be entitled to the full amount of such expense items from the income received by him from such law firm.

Thus the trial court's treatment of this question was in accord with authority relied upon by petitioner (Pet. 42) to the effect that presumptions are—

> *prima facie* precepts; and they presuppose only certain specific and expressed fact. The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. * * *

We submit, therefore, that the instruction in question fully protected petitioner's rights and adequately explained to the jury the factors to be considered in determining the factual issue involved. We believe the jury would have reached the same

result had the court referred to a "permissible inference" instead of a "presumption of law" and that petitioner's suggestions to the contrary are wholly without merit.

3. Petitioner, as is not uncommon after a long and bitterly contested trial, complains that the prosecutor was guilty of prejudicial misconduct in asking character witnesses, on cross examination, about petitioner's suspension by the Oklahoma Supreme Court in 1934, and in appealing to the passion and prejudice of the jury in his closing arguments (Pet. 43-53). This contention is also devoid of merit.

Petitioner first put his reputation in issue by improper cross examination of a Government witness (R. 211-212) and when the prosecutor asked, on redirect, whether the witness had heard petitioner was disbarred for embezzlement in Oklahoma by the Supreme Court, petitioner's counsel stated: "That is contrary to the fact" which prompted the prosecutor to reply: "It is not. We have a certified copy" (R. 213). Shortly thereafter, following a colloquy off the record, the court informed the jury that (R. 214):

> * * * the Court is informed by counsel that there were no disbarment proceedings against the defendant in this case in the state of Oklahoma. As a consequence of that you will disregard the questions and answers in that connection, of the preceding witness. It should

> not influence you in any respect in arriving at your verdict in this case.

Clearly, if there was any error in this incident it was cured by the prompt action of the court. This admonition was in fact extremely favorable to the petitioner since in 1934, "in a proceeding to disbar or discipline" him for failure to pay over money collected for a client (Pet. 58) he was suspended from practice by the Supreme Court of Oklahoma for one year. When the question was next asked of one of petitioner's character witnesses, the court sustained an objection thereto on the grounds of remoteness (R. 1218-1219); when the question was asked of the character witness Watson, the court required the prosecutor to re-frame it so as to inquire whether the witness had "heard" about the suspension, before permitting the witness to answer (R. 1222-1223). These isolated instances in a long trial could not have had the prejudicial effect urged by petitioner. The same is true of the alleged inflammatory argument of the prosecutor to the jury. In his opening argument the prosecutor indicated he was going to show "that the defendant was cheating his dying partner" in connection with a large settlement that had not been deposited in the bank accounts (R. 1377). The court promptly told the jury to disregard this statement, but petitioner's counsel thereafter referred to it (R. 1383), apparently satisfied to have the jury not forget it. During the argument on behalf of

petitioner, the jury was told (R. 1379, 1384, 1389, 1390-1391):

> Now, so that we may clear the air, which perhaps has been besmirched, if not befouled, by some of the testimony we have heard here, on the Government's side, * * *
>
> I don't know what we can say to our Government when, where there is an honest difference of opinion as to whether we owe any taxes or not, I don't know what we can say to the prosecutor who gets out his big prosecution bludgeon and says, "Give in, give in, or you are indicted." We have not given in, and we won't give in, we will have another day, no matter what the outcome of this law suit is.
>
> * * * And indeed, ladies and gentlemen of the jury, it [petitioner's reputation] is not in question, here or elsewhere, notwithstanding the vicious, insidious attempts of the Government time after time to smear him and besmirch him by bringing in references to an Oklahoma suspension. Every time they did it they met with rebuff from the Court.
>
> * * * What they wanted to do was to pour it on Bill Myres. That has been the whole tenor and purpose of the prosecution from the beginning to the end here and it will not stop until the distinguished district attorney employs his talents for invective and denunciation. That will be the time when the Government will have to at last stop it, trying to try this case upon some theory other than the facts.

The prosecutor's closing argument which followed must be viewed in the light of these passages which

he was not required to ignore. His argument that (R. 1404):

> I will undertake to say to you now that there wasn't a soldier in our armed forces, a sailor or a marine, that bared his breast to the enemy to protect such men as Myres, to protect our jury system, but what paid more money than William J. B. Myres did.

And that (R. 1405):

> As the gentlemen on this side said, the grand jury indictment is no evidence of his guilt, shouldn't be. But the grand jury did its duty when it indicted this man. All of us here have tried to do our duty in presenting this case. The Court will do his duty in charging you what the law is about the matter. But you cannot convict people unless petit juries do their duty, and I am confident that you ladies and gentlemen will, by returning a verdict of guilty.

were justifiable response to the argument on petitioner's behalf, even if, standing alone, they might be considered improper. Moreover, as was said in *United States* v. *Goodman,* 110 F. 2d 390, 395 (C. A. 7th)—

> * * * the trial judge is justified in assuming that the jurors possess sufficient common sense and discrimination to enable them to evaluate conduct and remarks of counsel even if the conduct and remarks should offend ordinary standards of propriety. It is only fair to jurors to assume that they do not always

take counsel as seriously as counsel, in the heat of argument, take themselves.

CONCLUSION

For the reasons above stated we believe that the petitioner was fairly tried and properly convicted and that the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX A

Internal Revenue Code:

SEC. 145. PENALTIES.

(a) *Failure to File Returns, Submit Information, or Pay Tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U. S. C. 1946 ed., Sec. 145.)

SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.

(a) *To Determine Liability of the Taxpayer.*—The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

* * * *

(26 U. S. C. 1946 ed., Sec. 3614.)

SEC. 3615. SUMMONS FROM COLLECTOR TO PRODUCE BOOKS AND GIVE TESTIMONY.

* * * *

(e) *Enforcement.*—Whenever any person summoned under this section neglects or re-

fuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U. S. C. 1946 ed., Sec. 3615.)

SEC. 3633. JURISDICTION OF DISTRICT COURTS.

(a) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

(26 U. S. C. 1946 ed., Sec. 3633.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.41-3. METHODS OF ACCOUNTING.—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. (See section 54 and section 29.54-1.) Among the essentials are the following:

(1) In all cases in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, inventories of the merchandise on hand (including finished goods, work in process, raw materials, and supplies) should be taken at the beginning and end of the year and used in computing the net income of the year (see section 22(c) and sections 29.22(c)-1 to 29.22(c)-8, inclusive);

(2) Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and

(3) In any case in which the cost of capital assets is being recovered through deductions

for wear and tear, depletion, or obsolescence, any expenditure (other than ordinary repairs) made to restore the property or prolong its useful life should be added to the property account or charged against the appropriate reserve and not to current expenses.

APPENDIX B

Extract from the trial court's instruction (R. 1418-1422):

> The real issue in the evidence of the parties is, what was the amount of net income earned by defendant in each of the years involved, and what items of expense should be allowed to defendant as deductions from the amount defendant is shown to have received as his share of the fees earned by the law firm of Sizer & Myres in each year to determine his net income?
>
> The evidence of the Government in that respect is that all checks issued by Mr. Myres, either on the bank account of Sizer & Myres, William J. B. Myres, Trustee, or from his personal account, reflecting expense or reasonably ascertained to be items of expense incurred in the handling of the business of Sizer & Myres should be allowed one-half to Mr. Myres and one-half to Mr. Sizer. After allowing to Mr. Myres a deduction based on that ratio, the further deductions for bar fees, contributions, interest paid, and other deductions allowed by law, the Government determines that Mr. Myres' net income for the year 1941 amounted

to $22,490, on which it claims a tax of $5,723.40. In 1942 it claims his income to be $13,690, on which a tax of $3,502.16 is claimed. In 1943 a net income of $9,636, on which it claims a tax of $2,347.06. In 1944 the Government fixes his net income at $25,126, and claims a tax of $10,373.58.

In ascertaining the amount of business expense to which he makes claim of deduction in each of the years involved, Mr. Myres's evidence is that he is entitled to deduct from the income received by him from the firm of Sizer & Myres one-half of the expense as revealed by all checks drawn on the bank account of Sizer & Myres, and 100 per cent of the items of expense as established by the checks issued for expense on the bank accounts carried in his individual name or as trustee.

It is chiefly in the claim of Mr. Myres to an allowance of 100 percent of the expenses revealed by checks issued on bank accounts carried by him in his name, personally or as trustee, that a decision of the factual issue as to what was his actual net income for the years in question depends. There are other allowances claimed by him in the evidence, but to allow all of them to him and to only allow, as a deduction of business expense, one-half of the amount of the expense as revealed by checks issued against bank accounts carried in his name would conclusively establish a gross understatement of income by him in each of the returns filed, as well as that reflected from the books reconstructed by him, and that he now owes the Government a considerable income

tax in each of the years in question, more than he has admitted.

So the question is presented to you, can Mr. Myres reasonably, under the evidence, claim as a deduction from the income received by him from his law firm 100 percent of the items of expense revealed by checks issued therefor on bank accounts carried in his name?

When Mr. Myres entered into partnership with Mr. Sizer he said he was, at the beginning of 1941, a 40 percent partner, that it was in March, 1941, that he and Mr. Sizer engaged in a 50-50 arrangement. That is the only statement made by Mr. Myres with reference to the provisions of terms of the partnership agreement. In law when men, engaged in business, enter into a partnership on a 60-40 basis or a 50-50 basis, and that is the only arrangement between them, then they are presumed to have agreed to share the profits and losses of such business partnership equally. Mr. Myres said his only arrangements with Mr. Sizer was that they entered into a 50-50 partnership. He does not state that there was any agreement between him and Mr. Sizer that he, Mr. Myres, was to stand all expenses of the maintenance of their law partnership out of his 50 percent share. From the arrangement and agreement stated by him, the presumption is to the contrary. If Mr. Myres was not obligated under his partnership agreement with Mr. Sizer to bear, out of his 50 percent of the fees received by his law firm, all expense of the maintenance of such firm, then Mr. Myres has no right to deduct 100 percent of the expense which he

claims as a deduction in determining the amount of his income for the years involved. He could not, under the law, if he was not legally obligated so to do, voluntarily assume the total amount of such expense, and use the total thereof as a deduction from his income in determining the amount of his own individual net income during the years in question.

Therefore, if you find and believe from the evidence that Mr. Myres did not agree with Mr. Sizer to assume 100 percent of the expense incurred by the law firm of Sizer & Myres, as established by checks drawn on his bank account for that purpose, and, in fact, that he did not assume 100 percent of the payment of such expense, then you are instructed that he is not entitled to a 100 percent deduction of such sums from fees paid to him by the firm of Sizer & Myres and in determining whether Mr. Myres had an income in each of the years in question you should disallow, to the extent of 50 percent thereof, all items of expense which the evidence establishes Mr. Myres claims as allowances for business expense incurred.

In determining whether defendant should be allowed the full amount of business expense items paid out of checking accounts standing in his name, you should recall and analyze the manner in which such accounts were kept, and the method Mr. Sizer and Mr. Myres used in settlement of accounts between them.

As I analyze such evidence, it seems all drafts and checks received in settlement of

cases were deposited in bank accounts. While a case was pending defendant, for the most part, issued the checks against his personal account for advances to clients, loans, traveling expenses, and other items of case expense. When the case was settled the client was given a check for his share, after the settlement in the case was deposited in Mr. Myres's personal bank account, less such advances made to the client, or loans made to him, during the pendency of the case.

Then Mr. Sizer and Mr. Myres made settlement between then or shortly thereafter did so. When they did so, it would appear, from checks issued to Mr. Sizer by Mr. Myres, that Mr. Myres would generally deduct all case expense paid and that the amount of fee which was paid to Mr. Sizer by check was one-half after deducting such expense. The method so used by them would seem to reveal that both Mr. Sizer and Mr. Myres stood the case expense in most cases handled by them during the years in question, on a 50-50 basis. Mr. Myres claims that all checks which he issued for case expense on his personal bank accounts were borne by him. If case expense was deducted prior to, or at the time of settlement made by Mr. Sizer and Mr. Myres, and Mr. Sizer received less than 25 percent of the gross amount for which a case was settled, then it would conclusively appear that he also sustained a portion of the case expense incurred by the law firm in a particular case. I do not recall any evidence, perhaps you do, where Mr. Sizer was issued a check by Mr. Myres for a

sum equal to 25 percent of the total amount of a case that was settled where the evidence establishes that expenses were incurred in such case. There is, I recall, much evidence to the contrary.

If you find and believe from the evidence beyond a reasonable doubt that the defendant knew that he was not legally liable for the full amount of the expense which he now claims, and that the defendant did not, in fact, bear the total amount of such expense out of his share of the fees received from the law firm, and that defendant, without justifiable excuse or in careless disregard of whether he had a right under the law to take the full amount of such expense items as a deduction from his earned income, and that he knowingly and intentionally, with full knowledge of such matters, nevertheless undertook to and did claim a deduction of the full amount of such expense items from his earned income in computing the amount of his net income, then those are facts, if you so find them, from which wilfulness on the part of the defendant may be inferred by you.

If, however, you find from the evidence that under any arrangement or agreement defendant had with Mr. Sizer that he was to defray and pay all the expense of the handling of a case or cases out of his share of the fees received from the firm, then under the law the defendant would be entitled to the full amount of such expense items from the income received by him from such law firm.

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